

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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JOSE RODRIGUEZ,

Plaintiff,

-against-

**ORDER**

03 CV 6219 (RJD)

JO ANN B. BARNHART, COMMISSIONER  
OF SOCIAL SECURITY

Defendant.

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DEARIE, District Judge.

This Court has reviewed both the Report & Recommendation of Magistrate Judge Robert M. Levy, dated August 2, 2005, and plaintiff's objections.

The Court had previously remanded this case solely for the purpose of having the ALJ review Dr. Lindahl's February 4, 2003 report to determine whether plaintiff could perform medium work during the relevant period. Plaintiff is not entitled to attorney's fees.

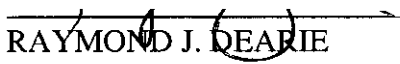
Even if this Court's previous remand order falls under Sentence Four of 42 U.S.C. Section 405(g), the position of the United States was substantially justified. 28 U.S.C. § 2412(d)(1)(A). "Substantially justified" has been defined as reasonable. Pierce v. Underwood, 487 U.S. 552, 565-66 (1988), Green v. Bowen, 877 F.2d 204, 207 (2d Cir. 1989). Although this Court determined that it was advisable for the ALJ to consider Dr. Lindahl's report submitted to the Appeals Council, there is legal and factual support for the Commissioner's position. Indeed, the Court noted that the ALJ's decision is otherwise supported by substantial evidence. The United States' position can be considered substantially justified even if the matter is remanded. Ortiz v. Chater, 95 CV 3126, 1997 WL 50217, \*2 (E.D.N.Y. Jan 30, 1997), Stein v. Sullivan,

966 F.2d 317, 320 (7th Cir. 1992).

Accordingly, Judge Levy's recommendation denying attorney's fees is adopted.

SO ORDERED.

Dated: Brooklyn, New York  
August 19, 2005

  
RAYMOND J. DEARIE  
United States District Judge